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No. 84-404

In the Supreme Court of the United States

OCTOBER TERM, 1984

JOHN CHRISTOPHER BEALE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Fourth Amendment requires that law enforcement officials have a reasonable suspicion that luggage contains contraband before it can be exposed to a sniff test by a trained narcotics detection dog.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 736 F.2d 1289. The court's prior decision (Pet. App. 15a-34a) is reported at 674 F.2d 1327.

JURISDICTION

The judgment of the court of appeals was entered on July 2, 1984. The petition for a writ of certiorari was filed on August 31, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following the denial of his suppression motion, petitioner was convicted at a bench trial on stipulated facts in the United States District Court for the Southern District of California of conspiracy to distribute cocaine, in violation of 21 U.S.C. 846, and of possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was

sentenced to concurrent terms of 30 months' imprisonment on each count, to be followed by a seven-year special parole term. The court of appeals reversed the conviction on the ground that the district court erred in denying the suppression motion (Pet. App. 15a-34a). This Court vacated the judgment and remanded the case for further consideration in light of *United States* v. *Place*, No. 81-1617 (June 20, 1983). No. 82-674 (June 27, 1983). A panel of the court of appeals ordered the case remanded to the district court to determine whether there was reasonable suspicion (Pet. App. 37a-49a), but the court of appeals granted rehearing en banc and affirmed petitioner's conviction (*id.* at 1a-13a).

1. Evidence adduced at a suppression hearing showed that on April 17, 1980, Detective Rick Berks and Deputy Larry Burk of the Broward County, Florida, Sheriff's Department were assigned to the airport narcotics interdiction detail at the Fort Lauderdale Airport.[1] While watching passengers in the vicinity of the National Airlines terminal, Detective Berks observed petitioner and co-defendant Joseph Pulvano[2] leave a taxicab, check three pieces of luggage including a large maroon suitcase, and enter the terminal together. Upon reaching a security checkpoint inside, the two men separated and independently approached the ticket counter, but then sat together in the boarding area. After observing this behavior, Detective Berks determined that the two men had obtained separate seating assignments on a National Airlines flight to San Diego, California, with a change of planes in Houston, Texas.

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[1]Petitioner's trial consisted of the filing of a stipulation ("Stip.") by the parties to certain facts developed during the suppression hearing, which was made a part of the trial record. The guilty verdict by the court was entered on the basis of the stipulated facts (Tr. 80-82).

[2]Pulvano pled guilty to a conspiracy charge following the denial of his suppression motion (Tr. 80) and was not a party on appeal.

Detective Berks also examined the labels on the defendants' luggage and noticed that Pulvano was watching him while he examined the bags (Pet. App. 16a; Tr. 6-7; Stip. 2-3).

Detective Berks then approached the two men, identified himself, and asked whether they objected to answering a few questions. When they responded that they did not, the officer explained that they were not under arrest, but asked to see their identification and inquired whether either of them had ever been arrested. Petitioner displayed a New Jersey driver's licence; Pulvano, who appeared extremely nervous, stated that his identification was in his suitcase and that he had been arrested on a narcotics charge six years earlier. Detective Berks then thanked them for their cooperation and walked to the other side of the boarding area. Approximately five minutes later, Pulvano approached Detective Berks and inquired whether anything was wrong. The officer responded that there was no problem at that time (Pet. App. 17a; Tr. 8-10; Stip. 3).

While Detective Berks was speaking with petitioner and Pulvano, Officer Burk obtained a trained narcotics detection dog. After Detective Berks concluded his converstion with the defendants, the officers went to the baggage loading ramp adjacent to the National Airlines ticket counter, which contained the baggage that petitioner and Pulvano had checked. The dog immediately "alerted" to petitioner's large maroon suitcase, indicating that it contained narcotics (Pet. App. 17a; Tr. 10-11; Stip. 3).

The officers then requested a computer check on the two men, which revealed that Pulvano had been arrested and convicted about six months before for possession of cocaine. Detective Berks then telephoned law enforcement officials at the airports in Houston, Texas, and San Diego, California, notifying them of the events that had transpired (App. 17a; Tr. 12-13; Stip. 3-4). Police officers in Houston

kept petitioner and Pulvano under surveillance as they changed planes there, observing that the two men acted as though they were traveling separately (Pet. App. 17a; Tr. 14; Stip 4).

When the two men deplaned in San Diego they were again observed by law enforcement officers, who noted that they did not appear to be traveling together and behaved as though they feared surveillance. As they reached the front of the terminal, Pulvano stopped at a telephone; petitioner walked directly to a taxi without making any effort to retreive his luggage (Pet. App. 18a; Tr. 49-50; Stip. 5). Police officers then approached petitioner and asked him about his luggage. In response, he stated falsely that he was traveling alone and that he had lost his claim ticket. Thereupon, the officers advised him that he was under arrest and escorted him back to the terminal (Pet. App. 18a; Tr. 50-53; Stip. 5-6).

While petitioner and Pulvano were under surveillance, other officers took a trained narcotics detection dog to the baggage claim area, and this dog also alerted to petitioner's large maroon suitcase (Pet. App. 18a; Tr. 29; Stip. 6-7). Shortly thereafter, the officers observed Pulvano retrieve the bags from the luggage carousel and proceed toward the nearest exit. The officers then stopped him and escorted him to the airport Narcotics Task Force Office, where he consented to a search of all the bags except the maroon suitcase (Pet. App. 18a; Tr. 30-32; Stip. 7). Subsequently, when petitioner arrived at the Narcotics Task Force Office, the dog also alerted to the shoulder bag that petitioner had been carrying (Pet. App. 18a; Tr. 63-64; Stip. 8).

Based on this information, the police obtained a warrant from a state court judge to search the two suitcases to which the dog had alerted. The ensuing search revealed that petitioner's shoulder bag contained approximately one kilogram of cocaine and that the maroon suitcase contained

approximately 137 grams of marijuana (Pet. App. 18a; Tr. 35; Stip. 8).

2. The district court denied the motions of petitioner and Pulvano to suppress the evidence obtained as the result of these searches (Tr. 72-78). The court rejected the contention that probable cause was required for the police at the Fort Lauderdale Airport either to remove the bags from the airline luggage rack or to expose them to a narcotics detection dog, explaining that "the present state of the law is that the dog search in Fort Lauderdale and here is not a search under the Fou[illegible]h Amendment" (Pet. App. 18a; Tr. 72).

The court of appeals reversed (Pet. App. 15a-34a). The court held that "the use of a canine's keen sense of smell to detect the presence of contraband within personal luggage *is* a Fourth Amendment intrusion, albeit a limited one that may be conducted without a warrant and which may be based on an officer's 'founded' or 'articulable' suspicion rather than probable cause." *Id.* at 31a-32a (footnote omitted). Accordingly, the court of appeals remanded the case to the district court for a determination whether the officers who exposed respondent's luggage to a dog sniff at the Fort Lauderdale airport possessed a reasonable suspicion that it contained contraband (*id.* at 33a-34a).

Thereafter, this Court, on the government's petition (No. 82-674), vacated the judgment of the court of appeals and remanded the case for further consideration in light of *United States* v. *Place*, No. 81-1617 (June 20, 1983). On remand, the court of appeals adhered to its prior decision (Pet. App. 37a-49a). The panel construed this Court's decision in *Place* permitting dog sniffs as limited to the situation where there was sufficient suspicion to warrant detention of the luggage (*id.* at 42a). Judge Reinhardt dissented (*id.* at 48a-49a). He agreed in principle with the majority's view,

but found that the Court's decision in *Place* was dispositive, leaving "no room for application of the Fourth Amendment to dog sniffs of luggage located in a public place" (*id.* at 49a).

The en banc court vacated the panel decision (Pet App. 1a-13a). Relying on *United States* v. *Place, supra*, and *United States* v. *Jacobsen*, No. 82-1167 (Apr. 2, 1984), it held that a luggage sniff by a trained narcotics dog does not constitute a "search" within the meaning of the Fourth Amendment. The court therefore affirmed the original judgment of conviction. Judge Pregerson dissented (Pet. App. 7a-13a).

ARGUMENT

1. Petitioner contends (Pet. 6-13), that the Fourth Amendment applies to canine sniffs of luggage and that reasonable suspicion is required before luggage can be subjected to a sniff test by a narcotics detection dog. As the en banc court below recognized, this argument is completely foreclosed by this Court's recent decisions in *Jacobsen* and *Place*.

In *Place*, the Court unequivocally stated that a sniff of luggage by a trained dog "did not constitute a 'search' within the meaning at the Fourth Amendment." Slip op. 11. In *Jacobsen*, the Court held that a chemical test that discloses whether or not a particular substance is cocaine does not compromise any legitimate interest in privacy. The Court relied heavily on *Place* in reaching this result. The Court specifically noted that *Place* "held that subjecting luggage to a 'sniff test' by a trained narcotics detection dog was not a 'search' within the meaning of the Fourth Amendment." *Jacobsen*, slip op. 13-14. The Court further explained that the reason for this holding was that the dog sniff "did not intrude upon any legitimate privacy interest [of the defendant because] the governmental conduct could

reveal nothing about noncontraband items." *Id.* at 14 n.24. This view has been accepted by every court of appeals to consider the question. See, *e.g.*, *United States* v. *Waltzer*, 682 F.2d 370, 373 (2d Cir. 1982), cert. denied, 463 U.S. 1210 (1983); *United States* v. *Goldstein*, 635 F.2d 356, 360-361 (5th Cir.), cert. denied, 452 U.S. 962 (1981). In light of this Court's authoritative holdings in *Place* and *Jacobsen*, petitioner's argument that the dog sniff test conducted in this case somehow constitutes a "search" within the meaning of the Fourth Amendment and could not be conducted in the absence of reasonable suspicion is no longer tenable.[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[3] *Katz* v. *United States*, 389 U.S. 347 (1967), plainly has no application here (cf. Pet. 9-10). Unlike a private telephone conversation, an individual has no legitimate expectation of privacy in the odors that inevitably escape from his luggage when he leaves it in a public place. Furthermore, as noted in *Place*, slip op. 10-11, and *Jacobsen*, slip op. 14 n.24, unlike the wiretap, which indiscriminately reveals all the contents of an individual's personal phone conversation, the sniff test discloses only the presence or absence of contraband, not any other information about the contents of the luggage.